

FACTUAL BACKGROUND:

Cynthia Johnston, herein the grievant, began work for the Manitowoc County Health Care Center as a nursing assistant on May 23, 1990. She worked part-time at first and began working full-time about nine or ten months prior to her termination. She has worked on all of the Center's various units.

The grievant worked on 2-West from the end of December, 1992, until her termination.

On May 11, 1993, Rhonda Rutherford, also a nursing assistant on 2-West during the time in question, contacted Dawn Holsen, the Director of Nursing for the Center, to complain about the grievant's abuse of certain patients.

On May 12, 1993, in the presence of a Union representative, Donna Tadych, Holsen interviewed the grievant in her office regarding those allegations. At the conclusion of the interview, Holsen suspended the grievant pending a further investigation into the charges that had been made against her.

On May 13, 1993, Rutherford reduced her allegations to writing stating in material part as follows:

1. Asking a patient (E.D.) in a harsh tone of voice "Why did you shit your bed full?"
2. Pinching H.T., a female resident, on the side of her face, while stating "I'll let go when you let go." H.T. had a hold on the grievant.
3. Stating to a patient, G.B., "you have puke breath."

During the course of the investigation, another employe, Susan Pieschel, reported the grievant told G.B., who suffers from Huntington's Chorea, a disease characterized by patients' inability to control their movements and their muscle control, "involuntary movements my ass" as G.B. was "more or less thrashing out at us."

No resident incident reports exist or were filed on any of the above alleged incidents.

On May 14, 1993, the County discharged the grievant for

"violating the 'Resident Abuse Policy' which is based on Federal Code 483.13 (b) and (c) and the codes relating to nursing assistant practice HSS 129.03(1)." The County's discharge notice recounted the three instances of verbal abuse, and one instance of physical abuse described above, but gave no specific dates for any of the alleged incidents.

The only previous discipline of the grievant was for an unauthorized cigarette break on December 7, 1992.

The grievant filed a grievance over her discharge on May 18, 1993.

By letter dated June 7, 1993, the Bureau of Quality Compliance (part of the Department of Health and Social Services, State of Wisconsin) informed the grievant that it had received a complaint from the Center "alleging that you were observed being verbally abusive to residents and that you pinched a resident on the face in April, 1993." In said letter, the Bureau also informed the grievant that it would be conducting an investigation into said allegations.

Thereafter, on September 14, 1993 the Bureau issued the following findings:

The Bureau of Quality Compliance conducted an investigation on July 12-30, 1993 regarding a complaint alleging that you were observed being verbally abusive to residents and that you pinched a resident on the face at Manitowoc Health Care Center in April, 1993. During the course of the investigation, records and policies and procedures were reviewed, and interviews were conducted with you and several facility staff.

Based upon this investigation, we did not verify that the incidents described in the complaint occurred. Therefore, the complaint is not substantiated and no information concerning this matter will be added to the Nurse Aide Registry. Information about the complaint and investigation is considered confidential and will not be released to the general public.

The Center has a policy regarding Resident/Patient Abuse which its employes, including the grievant, are familiar with. This policy provides in material part as follows:

POLICY: The facility shall ensure each

resident's right to be free from verbal, sexual, physical or mental abuse, corporal punishment, and involuntary seclusion. All residents shall be treated with respect, dignity and compassion.

PROCEDURE:

1. Definitions:

- "Verbal abuse" refers to any use of oral, written or gestured language that includes disparaging and derogatory terms to residents or their families, or within their hearing, to describe residents, regardless of their age, ability to comprehend, or disability.

. . .

- "Physical abuse" includes hitting, slapping, pinching, kicking, etc. It also includes controlling behavior through corporal punishment.

. . .

2. Residents may not be subjected to abuse by anyone (including but not limited to: employees of the facility. . .

. . .

4. Every employee of the facility is required to report any occurrence of abuse or suspected abuse.

5. Any alleged violation involving mistreatment, neglect or abuse, (including injuries of unknown origin) shall be reported immediately to the Administrator. In the Administrator's absence, it shall be reported to the Assistant Administrator or Director of Nursing.

. . .

A. Investigations of Employees

. . .

III. Where an allegation is substantiated, corrective action may include formal discipline, up to and including termination.

. . .

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 4 - DISCIPLINARY PROCEDURES

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer shall provide the employee and Union with a letter setting forth the reason(s) for the disciplinary action.

. . .

B. Discharge: When an employee is discharged or terminated by the Employer, a written discharge or termination report shall be prepared stating the effective date and the reason(s) for the discharge or termination. One (1) copy of the report shall be retained by the Employer, one (1) copy shall be given to the employee, and one (1) copy shall be filed with the Union.

ch. HSS 129, WIS. ADM. CODE:

HSS 129.03 Definitions. In this chapter:

(1) "Abuse" means conduct evincing such willful and wanton disregard of a client's physical and mental needs and interests as is found in deliberate violations or disregard of client rights, or in carelessness or negligence of such degree or frequency as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the aide's duties and obligations to the client. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertency or ordinary

negligence in isolated instances, or good faith errors in judgment or discretion are not deemed to be abuse. "Abuse" includes neglect and mistreatment.

. . .

5. "Reasonable cause" means that the preponderance of evidence leads the decisionmaker to believe the incident occurred.

. . .

(d) **Decision.** 1. Upon completing its investigation, the department shall prepare a written decision and mail it to the aide, the health care provider involved in the alleged incident and the complainant.

2. If the department determines there is credible evidence to substantiate the allegation, the department's written decision under sub. 1 shall be sent to the aide, the involved health care provider. . . .

PARTIES' POSITIONS:

The Union basically argues that the County did not have just cause to terminate the grievant because the County did not prove that the grievant was guilty of the acts complained of. In this regard the Union maintains that since there were no witnesses to the alleged incidents of abuse, the question before the Arbitrator is really whose story to believe. Based on a lack of specific dates for the allegations, a lack of any incident reports, County witness Rutherford's condition (she had been taking Prozac at the time of the alleged incidents and was having difficulty sleeping) rendering her testimony suspect, and the credible testimony of the grievant's character witnesses reporting her exemplary behavior and indicating that the alleged actions of the grievant which resulted in her discharge would have been out of character, the Union argues that the Arbitrator should credit the grievant's testimony denying that any of the incidents which formed the basis for her discharge had ever occurred and uphold the grievance. For a remedy, the Union requests that the grievant be reinstated to her former position and be made whole for all lost wages and benefits due to the County's action.

The County, on the other hand, maintains that discharge was

appropriate considering one, the seriousness of her offenses; two, the fact that the allegations against the grievant were supported by substantial evidence; three, the grievant had advance warning of the possible consequences of her conduct in violating rules that were clearly related to the appropriate operations of the institution at which she was employed; four, the County conducted a fair and objective investigation of the allegations against the grievant; and five, the testimony of the County's witnesses was credible and not in any way impeached by any of the Union's witnesses. The County also argues that the Arbitrator "should consider this matter de novo and owes no deference to the decision of the Nurse Aide Registry" finding that the complaint of patient abuse against the grievant was not substantiated. Based on the foregoing, and the record evidence, the County requests that the Arbitrator uphold its decision to discharge the grievant and deny the grievance.

DISCUSSION:

At issue is whether there is just cause to discharge the grievant.

Article 4 of the collective bargaining agreement provides that "Employees may be disciplined for just cause." The County maintains that it had just cause to terminate the grievant while the Union takes the opposite position.

There are two basic and fundamental questions in any case involving just cause. One is whether the employe is guilty of the actions complained of. In addition, it should be noted that the Employer has the duty of so proving by a clear and satisfactory preponderance of the evidence. 1/ The second arises if the answer to the first question is affirmative. If guilty, the next basic question is whether the punishment fits the crime.

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the grievant was guilty of verbally and physically abusing patients/residents as alleged by the County.

1/ Arbitrators differ as to the appropriate standard to be applied. Some have concluded that a "preponderance of evidence" is sufficient, while others have adopted the more stringent "clear and convincing" or "beyond a reasonable doubt" standard. The Arbitrator finds no basis in the record to deviate from the "reasonable cause" or "preponderance of evidence" standard applied by the Bureau of Quality Compliance in making its determination regarding the same allegations.

The County relies on the testimony of three witnesses -- Dawn Holsen, Rhonda Rutherford and Susan Pieschel -- in support of its position that the grievant's actions warranted discharge. For the reasons listed below, the Arbitrator is of the opinion that the testimony of said witnesses should be given less weight than that of the Union's witnesses in determining what, if any, conduct the grievant is guilty of.

Holsen, the Director of Nursing, testified on behalf of the County regarding her investigation into the allegations of patient abuse and her actions following the investigation. Although Holsen terminated the grievant for verbal and physical abuse of residents as noted above, Holsen did not have any firsthand knowledge of the circumstances surrounding the allegations instead relying on the statements of Rutherford and Pieschel to form her conclusions as to what took place. In addition, although Holsen interviewed a number of employes as part of her investigation Tr. 15, 18, and 32, she was unable to obtain any corroboration of the allegations. Furthermore, no incident reports exist or were filed regarding the alleged incidents described in the discharge notice.

The Arbitrator also notes that in the notice of termination Holsen was unable to identify any specific dates for any of the alleged incidents described in the discharge notice. Finally, the Arbitrator finds Holsen's testimony less than persuasive because of the inconsistencies and conflicting nature of some of her statements. For example, while it is true, as pointed out by the County, that Holsen's testimony on direct examination Tr. 18, regarding what Pieschel said during the investigation as to who was present when the "involuntary movements, my ass" remark was made was consistent with the testimony of the other two County witnesses, it was not consistent with her (Holsen's) testimony on cross examination in two different instances. Tr. 28 lines 12-20. (Emphasis supplied): The County's representative, with respect to this inconsistency, writes in his reply brief that he "wishes that he had made the objection: 'Asked and answered' when Mr. Ugland went over this again with Ms. Holsen -- that would have eliminated this confusion. The fact that Holsen may have been flustered" However, in the Arbitrator's opinion, there is no persuasive evidence in the record either that Holsen was "flustered" during her testimony or that a timely objection by the County would have rehabilitated her testimony. The Arbitrator would point out that Holsen was also unclear, if not inconsistent, with respect to the description of her method of questioning employes during the investigation stating on cross examination that she "presented all of the reports that I received to the people that I interviewed" Tr. 32, while suggesting on redirect that she didn't ask about specific incidents if employes said they weren't there. Tr. 33-34.

Since Holsen was unable to independently corroborate any of Rutherford's or Pieschel's allegations, her conflicting testimony

on this point raises a serious question regarding both the method and results of her investigation.

Rhonda Rutherford, a nursing assistant who worked with the grievant on 2 West, reported to Holsen on May 11, 1993 allegations concerning patient abuse including allegations #2 and #3 (verbal abuse) and allegation #1 (physical abuse) contained in the discharge notice noted previously. Rutherford's testimony that she did not have any personal animosity towards the grievant, and that they got along well . . . in every other aspect Tr. 53, as well as her statements about her concern over the grievant's treatment of patients Tr. 52, attest to the sincerity of Rutherford's testimony as well as her statements to Holsen. However, her inability to give an exact or even approximate date as to when these events took place (see her testimony Tr. 51 and 54-55) at any time material herein despite testifying as to exactly what was said or done which constituted the alleged abuse, her failure to report these incidents of alleged patient abuse on a timely basis as required by County policy, and her physical condition during the time in question ("The Prozac, it was keeping me up at night, I wasn't sleeping as well as I should have been." Tr. 57) which could have affected her ability to concentrate and/or accurately remember things 2/ all detract from the credibility of her story.

Likewise, the Arbitrator finds that the testimony of Susan Pieschel who worked with the grievant has some merit based on her knowledge of County policy as to what constitutes patient abuse Tr. 60, and her obvious lack of any animosity toward the grievant. Tr. 61. However, the Arbitrator is again troubled by Pieschel's lack of knowledge regarding a timeframe Tr. 59, either with respect to the date Holsen interviewed her or the date of the alleged incident. Also, despite having a knowledge of the County's policy on resident/patient abuse Tr. 60, Pieschel did not report the incident of patient abuse she allegedly viewed on a timely basis as required by said rules.

The Union, on the other hand, offered the testimony of the grievant and a number of character witnesses on her behalf. Their combined testimony was more believable than that of the aforesaid County witnesses.

2/ Lack of sleep alone, in the Arbitrator's opinion, could affect the reliability of the grievant's observations. Prozac itself may impair judgment, thinking, or cause decreased concentration. See, for example, Dista Products Company literature revised 2/15/93 on Prozac. Rutherford denied any other side effects (except difficulty sleeping) from taking Prozac. Tr. 57.

The grievant testified clearly and emphatically that she was not guilty of the conduct complained of. Tr. 91-92. This testimony is consistent with her statements when she was suspended. Tr. 15 and 98. Her statements regarding her response when E.D. hit her across the face with a wet wash cloth full of BM (She handled it calmly with a smile and asked E.D. not to do that Tr. 93-94,) were corroborated by Nancy Hubbartt, a housekeeper who was helping her at the time. Tr. 41. Based on the foregoing and the grievant's demeanor at hearing as well as the record as a whole, the Arbitrator finds the grievant's testimony persuasive.

The Union also offered the believable testimony of a number of witnesses which supported the proposition that the actions of the grievant which resulted in her discharge would have been out of character. While it is true as the County points out that some of those witnesses had only limited contacts with the grievant -- Merida Hubbart had worked with the grievant "about five times" Tr. 77, and Sharon Hansen worked with her "approximately five times since she's been here" Tr. 83 -- others had much more extensive contacts with the grievant -- Judy Schiman had worked with the grievant "20, 25 times, I couldn't say" during the twelve months preceding the grievant's discharge Tr. 63, and even when they worked the same floor but not with each other as partners you're "pretty familiar" with what's happening on the unit, and would hear about something happening drastic. Id. Joan Glaeser worked with the grievant for "a little more than a year" Tr. 79, at a time the grievant was working on a part-time basis. Tr. 80. Nancy Hubbartt worked as a nurse's aide with the grievant approximately 15 times in the last two years Tr. 37, and worked "around" the grievant when she performed housekeeping duties. Tr. 38.

Nevertheless, whether the Union witnesses had only limited or extensive contacts with the grievant they all persuasively basically said the same thing: the grievant was a conscientious employe who treated patients in a caring, respectful and considerate manner and it would be out of character for her to act in the manner alleged by the County. Nancy Hubbartt testified that the grievant was "real calm and collected" and "handled herself very well" in dealing with E.D. Tr. 41. She was "a good nurse's aide" and I enjoyed working with her. Tr. 42. Likewise, Schiman stated that the grievant was a good worker and never the subject of any rumors regarding abuse or neglect of residents. Tr. 64. Schiman testified as to the professional manner in which the grievant treated a patient who punched her in the jaw. Tr. 67-68. Michelle Junk testified on how the grievant related to the residents: "she's kind and considerate and she would always make sure their needs were met." Tr. 71. Merida Hubbart stated that the grievant was "a good worker" who works well with the residents and that on the occasions she has worked with her the grievant has

"never" been abusive or neglectful of residents. Tr. 76. Glaeser testified that the grievant worked well with combative patients, and described her as a "very loving, caring, good person." Tr. 79. Glaeser described the special relationship the grievant had with one resident who "loved Cindy" and would let only the grievant cut her hair. Hansen also testified that the grievant handled difficult residents properly: "From what I have seen she handled it fine, she would more or less like turn away and she wouldn't do anything back to them or anything." Tr. 83. This testimony, in the opinion of the Arbitrator, casts strong doubt on the accuracy of the County's allegations regarding the grievant's conduct.

Based on all of the foregoing, and the record as a whole, the Arbitrator finds that the County did not sustain its burden of proving that the grievant was guilty of verbally and physically abusing patients/residents as alleged by the County in its discharge notice. Consequently, the Arbitrator concludes that the County did not have just cause to terminate the grievant and that the answer to the issue as stipulated to by the parties is YES, the County violated the collective bargaining agreement by terminating the grievant, Cynthia Johnston. Although the Arbitrator has reached this conclusion without considering the Bureau of Quality Compliance determination, the Arbitrator feels it is worth pointing out that the Bureau conducted an investigation into the allegations surrounding the grievant but could "not verify that the incidents described in the complaint occurred" thus concluding that the complaint was not substantiated. In dismissing the complaint against the grievant, the Bureau applied basically the same standard of proof utilized by the Arbitrator and reached the same conclusion -- the allegations against the grievant are without merit. 3/

The Arbitrator would emphasize that in reaching the above conclusions he does not discount the importance of protecting the residents' physical and mental well-being by preventing resident/patient abuse. The County's concerns in that area and its responsibilities to prevent, investigate and rid itself of abusing employes are supported by both legal and moral standards.

3/ As noted above, the Arbitrator was able to make a decision in the instant case without considering the Bureau's investigation and determination in the matter. (Emphasis added). Consequently, the Arbitrator finds it unnecessary to respond to the parties' arguments concerning the deference, if any, the Arbitrator should pay to the decision of the Nurse Aide Registry and concerning the propriety of the County's reference in brief to the November 7, 1993 Milwaukee Journal article about the activities of the Registry.

The Arbitrator would also emphasize that in making his decision regarding the relative weight given the testimony of the County's witnesses, he does not discredit the genuineness of the beliefs of those witnesses, particularly Rutherford and Pieschel who came forward with their concerns and Holsen who acted on them. The Arbitrator wants to make it perfectly clear that such allegations, if proven, would subject the offending party to discipline up to and including termination.

In light of the foregoing and the record as a whole, and in the absence of any persuasive evidence or argument to the contrary, it is my

AWARD

The grievance of Cynthia Johnston is sustained. The County is ordered to immediately reinstate the grievant, restore to her all her rights under the collective bargaining agreement, remove from Johnston's employment record all references to the subject termination and take whatever other steps are necessary to adjust its records so that they do not contain any reference to verbal or physical abuse of patients/residents by the grievant which were the subject of this proceeding, and make the grievant whole, without interest, for the loss of wages and benefits she experienced as a result of the County's action. The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin this 3rd day of January, 1994.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator